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Joint and Several Liability Minnesota Style

Abstract

This article examines the rule of joint and several liability as it was adopted, modified, and applied in Minnesota circa 1989. The article first examines the judicial origins and applications of the rule in Minnesota. It then analyzes the impact of the comparative negligence and fault legislation on the rule of joint and several liability, including the limitations imposed on the rule in 1978, 1986, and 1988. Finally, it makes some suggestions for interpreting joint and several liability legislation that are consistent with the legislative history of the legislation as well as with Minnesota Supreme Court decisions concerning aggregation under the Comparative Fault Act.

Keywords

Torts, Minnesota law, joint liability, personal injury, contributory fault, comparative negligence, negligence, loss reallocation

Disciplines

Torts

JOINT AND SEVERAL LIABILITY MINNESOTA STYLE

MICHAEL K. STEENSON†

INTRODUCTION

The rule of joint and several liability results in the imposition of liability on multiple defendants whose fault combined to cause a single, indivisible injury or damage to the plaintiff.¹ When defendants have acted jointly, concurrently, or successively in causing the injury to the plaintiff,² but the injury or damage sustained by the plaintiff cannot be apportioned, the defendants are individually and jointly responsible for the entire damage sustained by the plaintiff. The plaintiff is entitled to enforce the claim for damages against any or all of the defendants.³ Under the rule of joint and several liability, if any defendant's share of the judgment is uncollectible it becomes the responsibility of the remaining party or parties to the litigation.⁴

The rule of joint and several liability has become a primary target of proponents of tort reform in Minnesota and other states. In the past three or four years well over half the states have enacted legislation aimed at limiting the rule of joint and several liability.⁵

In Minnesota the supreme court adopted the rule of joint and several liability in the latter part of the nineteenth century.

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1. See, e.g., *American Motorcycle Ass'n v. Superior Court*, 20 Cal. 3d 578, 586-87, 578 P.2d 899, 903-04, 146 Cal. Rptr. 182, 187 (1978); *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash. 2d 230, 234-35, 588 P.2d 1308, 1312 (1978); W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 47, 52 (5th ed. 1984) [hereinafter *PROSSER & KEETON*]; V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 16.3 (2d ed. 1986).

2. See *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 366 n.1 (Minn. 1977).

3. *PROSSER AND KEETON*, *supra* note 1, at § 47.

4. See *id.* See also Phillips, *To Be or Not To Be: Reflections on Changing Our Tort System*, 46 MD. L. REV. 55, 61 (1986).

5. See Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 TORT & INS. L.J. 482, 485-93 (1988).

The rule existed in its pure form, even after the enactment of the comparative negligence statute in 1969. The rule was limited by the adoption of a loss reallocation provision in 1978, when the comparative negligence act was modified as part of the tort reform effort in that year. In 1986 the legislature again modified the rule, limiting its application in cases involving the state and its municipalities. And again in 1988 the legislature modified the rule by making it inapplicable to defendants whose fault falls below a specified percentage.

It is the purpose of this article to examine the rule of joint and several liability as it has been adopted, modified, and applied in Minnesota. The Article first examines the judicial origins and applications of the rule in Minnesota. It then analyzes the impact of the comparative negligence and fault legislation on the rule of joint and several liability, including the limitations imposed on the rule in 1978, 1986, and 1988. Finally, it makes some suggestions for interpreting the new joint and several liability legislation that are consistent with the legislative history of the legislation as well as with Minnesota Supreme Court decisions concerning aggregation under the Comparative Fault Act.

I. THE HISTORICAL ORIGINS OF THE RULE OF JOINT AND SEVERAL LIABILITY IN MINNESOTA

The rule of joint and several liability in Minnesota can be traced to *Flaherty v. Minneapolis. & St. L. Ry.*,⁶ a 1888 Minnesota Supreme Court case in which the court summarily adopted the rule without any indication of the policies supporting the rule.⁷ Subsequent Minnesota cases have consistently reaffirmed the rule. In *Virtue v. Creamery Package Mfg. Co.*,⁸ a 1913 case, the court framed the rule of joint and several liability in the following way:

[U]nder the rule, which is well recognized, . . . all who actively participate in any manner in the commission of a tort, or who procure, command, direct, advise, encourage, aid, or abet its commission, or who ratify it after it is done, are jointly and severally liable therefor, . . . even though they act independently and without concert of action or common

6. 39 Minn. 328, 40 N.W. 160 (1888).

7. *Id.* at 329, 40 N.W. at 160-61.

8. 123 Minn. 17, 142 N.W. 930 (1913).

purpose, provided their several acts concur in tending to produce one resulting event.⁹

By 1981, the supreme court noted in *Maday v. Yellow Taxi Co.*¹⁰ that "[i]t has always been the law of this state that parties whose negligence concurs to cause injury are jointly and severally liable although not acting in concert."¹¹

The rule has been applied or considered in joint duty cases where the defendants have engaged in concerted action, ranging from conspiracy to defraud the plaintiff,¹² malicious prosecution,¹³ and assault and battery,¹⁴ to cases involving joint ventures,¹⁵ joint enterprises,¹⁶ partnerships,¹⁷ and other vicarious liability cases.¹⁸ The joint duty concept is also broader, applying to cases where two or more defendants owe the same duty to the plaintiff and neither the obligation nor breach are divisible.¹⁹ The rule has also been applied in cases involving concurrent acts of negligence²⁰ as well as in cases involving successive acts of negligence or fault.²¹

The rule has been applied numerous times in personal injury and wrongful death cases,²² but it has also been applied in cases involving interference with use and enjoyment of prop-

9. *Id.* at 40, 142 N.W. at 939 (citations omitted).

10. 311 N.W.2d 849 (Minn. 1981).

11. *Id.* at 850.

12. *See, e.g.*, *Gronquist v. Olson*, 242 Minn. 119, 64 N.W.2d 159 (1954); *see also* *Spring Co. v. Holle*, 248 Minn. 51, 78 N.W.2d 315 (1956); *Powers v. American Traffic Signal Corp.*, 167 Minn. 327, 209 N.W. 16 (1926).

13. *See* *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 142 N.W. 930 (1913).

14. *See* *Warren v. Westrup*, 44 Minn. 237, 46 N.W. 347 (1890).

15. *See, e.g.*, *Krengel v. Midwest Auto. Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841 (1973).

16. *See* *Delgado v. Lohmar*, 289 N.W.2d 479 (Minn. 1979); *Ruth v. Hutchinson Gas Co.*, 209 Minn. 248, 296 N.W. 136 (1941).

17. *See, e.g.*, *Brunson v. Seltz*, 419 N.W.2d 547 (Minn. Ct. App. 1988).

18. *See, e.g.*, *Kisch v. Skow*, 305 Minn. 328, 233 N.W.2d 732 (1975).

19. *See* *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795 (Minn. 1982); *Judd v. Landry*, 211 Minn. 465, 1 N.W.2d 861 (1942).

20. *See, e.g.*, *Mathews v. Mills*, 288 Minn. 16, 178 N.W.2d 841 (1970) (automobile accident); *Johnson v. City of Fairmount*, 188 Minn. 451, 247 N.W. 572 (1933) (nuisance); *Doyle v. St. Paul Union Depot Co.*, 134 Minn. 461, 159 N.W. 1081 (1916) (train wreck).

21. *See, e.g.*, *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977) (products liability); *Fette v. Peterson*, 404 N.W.2d 862 (Minn. Ct. App. 1987) (dram shop).

22. *See, e.g.*, *Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746 (Minn. 1980); *Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362 (Minn. 1977); *Mathews v. Mills*, 288 Minn. 16, 178 N.W.2d 841 (1970).

erty,²³ physical damage to property,²⁴ and cases involving economic loss.²⁵ The breadth of the application of the rule of joint and several liability becomes important in light of the limitations the legislature has imposed on the rule of joint and several liability through amendments of the Comparative Negligence Act. The reason is that the legislative limitations reach only as far as the Comparative Fault Act.

II. LIMITATIONS ON THE RULE OF JOINT AND SEVERAL LIABILITY

There are two limitations on the reach of the Comparative Fault Act, and thus potential limitations on the rule of joint and several liability. One of the limitations is based on the type of loss and the other on the type of claim. The first limitation is in the first section of the statute, which provides that "[c]ontributory fault shall not bar recovery in an action by any person or the person's legal representative to recover damages for fault resulting in death or in injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought. . . ."²⁶ The Act applies only to actions for *fault* resulting in *death or in injury to person or property*. The Act does not reach claims for economic loss. On its face it therefore appears to be inapplicable to claims such as professional malpractice claims that result solely in economic loss.

However, the supreme court has held that contributory negligence is a defense to claims for negligent misrepresentation,²⁷ intimating that the Comparative Negligence Act applies to claims for economic loss, although the court has not directly addressed the issue of whether the Comparative Negligence Act applies to such claims. The court's discussion of the issue is as follows:

Do the principles of comparative responsibility, as set out in

23. See *Johnson v. City of Fairmont*, 188 Minn. 451, 247 N.W. 572 (1933).

24. See *Greenwood v. Evergreen Mines Co.*, 220 Minn. 296, 19 N.W.2d 726 (1945); *Lawrenz v. Langford Elec. Co.*, 206 Minn. 315, 288 N.W. 727 (1939).

25. See, e.g., *Lesmeister v. Dilly*, 330 N.W.2d 95 (Minn. 1983) (indicating that the rule is generally inapplicable in contract actions); *Spring Co. v. Holle*, 248 Minn. 51, 78 N.W.2d 315 (1956) (fraud); *Mike's Fixtures, Inc. v. Bombard's Access Floor Systems*, 354 N.W.2d 837 (Minn. Ct. App. 1984) (breach of contract).

26. MINN. STAT. § 604.01, subd. 1 (1988).

27. See *Florenzano v. Olson*, 387 N.W.2d 168, 176 (Minn. 1986).

the Comparative Negligence Act, apply to negligent misrepresentation? This is a case of first impression in our state. Without question, principles of comparative negligence would not apply to an intentional tort; we have never so applied them. . . . Where society wants certain conduct absolutely prohibited and discouraged, apportionment of fault is not appropriate. Where the tort is not intentional, however, the answer may be different.

The Court of Appeals declined to apply comparative negligence to cases of negligent misrepresentation, relying on the rationale of the California Court of Appeals in the case of *Carroll v. Gava*, 98 Cal. App.3d 892, 159 Cal.Rptr. 778 (1979). . . . The majority of other states considering the issue disagree and have held principles of comparative responsibility applicable to cases of negligent misrepresentation. . . . This is also the view of respected commentators, including the Restatement (Second) of Torts. . . .

We agree with these commentators and with the majority of states that have considered the issue. This court has long favored the concept of comparative negligence as a just way to apportion liability. We applied the Comparative Negligence Act expansively, even extending it to many causes of action not traditionally within the scope of negligence. We hold that the principles of comparative responsibility apply to negligent misrepresentation. . . .²⁸

In noting that it has applied the Comparative Negligence Act expansively, the court pointed to cases involving losses that are within the purview of the Comparative Negligence Act. *Jack Frost, Inc. v. Engineered Bldg. Components Co.*,²⁹ involved defectively designed chicken barns, one of which collapsed and four of which had to be repaired because of defective roof trusses.³⁰ *Leskey v. Heath Eng'g Co.*,³¹ was a products liability case arising out of a severe electrical shock sustained by the plaintiff while using a cutting machine manufactured by the defendant.³² The third case, *Scott v. Indep. School Dist. No. 709*,³³ involved a personal injury claim based on a breach of statute by the school district in failing to require students to wear protective

28. *Id.* at 175-76 (citations and footnotes omitted).

29. 304 N.W.2d 346 (Minn. 1981).

30. *Id.* at 349.

31. 293 N.W.2d 39 (Minn. 1980).

32. *Id.* at 40.

33. 256 N.W.2d 485 (Minn. 1977).

safety eye devices in an industrial arts class.³⁴

However, the primary consideration involved in those cases was whether the principle would apply to causes of action not specifically noted in the statute. The issues did not concern the type of loss involved. Only *Jack Frost* would raise questions as to whether the loss covered in that case was the right kind of "property damage" to fall under the specific language of the Comparative Negligence Act. The personal injuries in the other cases obviously qualify.

In *Halla Nursery, Inc. v. Baumann-Furrie & Co.*,³⁵ the court of appeals directly held that the comparative fault act applied in an accounting malpractice case. Halla Nursery brought suit against Baumann-Furrie & Co. for the accounting firm's failure to discover a Halla employee's embezzlement of large sums of money from the nursery during the period in which the firm was providing accounting services for Halla. The accounting firm alleged that Halla was contributorily negligent in failing to discover the embezzlement.

The trial court permitted the jury to consider Halla's negligence. The jury determined that both Halla and Baumann-Furrie were negligent and apportioned 80% of the fault to Halla and 20% to Baumann-Furrie. The trial court determined that Halla would not be entitled to recover damages, but granted a new trial on the liability issue. The court of appeals affirmed based upon the trial court's failure to instruct the jury as to the effect of its answers to the comparative fault question.

The court of appeals first held that a client's contributory negligence is a defense in a case involving an accountant's negligence "only if the client's negligence contributed to the accountant's failure to perform the contract."³⁶ The court held that if contributory negligence is in issue the jury should also be instructed on comparative negligence, including the effect of its answers on the comparative negligence question.³⁷

Halla is perhaps the clearest statement by an appellate court that the Comparative Fault Act specifically applies to claims for economic loss. The loss suffered by Halla Nursery in the case

34. *Id.* at 487.

35. 438 N.W.2d 400 (Minn. Ct. App. 1989).

36. *Id.* at 402.

37. *Id.* at 403.

is clearly economic loss, but the court's specific reference to the Comparative Negligence Act makes clear its implicit assumption that the Act applies to claims for economic loss. Yet the fact remains that the Act does not include claims for economic loss. If the Act is extended to claims for economic loss, then a question arises as to whether the remaining parts of the Comparative Negligence Act apply to economic loss cases, including the loss reallocation provisions and the limitations on joint and several liability.

The second limitation is in the definition of *fault* in the act:

"Fault" includes acts or omissions that are in any measure negligent or reckless toward the person or property of the actor or others, or that subjects a person to strict tort liability. The term also includes breach of warranty, unreasonable assumption of risk not constituting an express consent, misuse of a product and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and contributory fault.³⁸

The Act thus applies only to claims for *fault*, which include negligence, reckless misconduct, strict liability, and breach of warranty. It does not apply to claims for breach of contract, nor does it apply to intentional torts.

If the Act does not apply because of one of these limitations, then it seems clear that the limitations on joint and several liability are inapplicable, unless they are judicially imposed. Although the court has indicated that it has latitude to formulate loss allocation rules that are incompatible with the Comparative Fault Act,³⁹ the impact of these Comparative Fault Act limitations has not been explored in connection with the rule of joint and several liability.

III. THE 1978, 1986, AND 1988 LIMITATIONS

In 1978 the legislature added two sections dealing with joint and several liability, sections 604.02 and 604.03. Section 604.02 read as follows:

Subdivision 1. When two or more persons are jointly liable, contributions to awards shall be in proportion to the

38. MINN. STAT. § 604.01, subd. 1a (1988).

39. See *Tolbert v. Gerber Indus.*, 255 N.W.2d 362, 367-68 (Minn. 1977) (discussing indemnity rules).

percentage of fault attributable to each, except that each is jointly and severally liable for the whole award.

Subd. 2. Upon motion made not later than one year after judgment is entered, the court shall determine whether all or a part of a party's equitable share of the obligation is uncollectible from that party and shall reallocate any uncollectible amount among the other parties, including a claimant at fault, according to their respective percentages of fault. A party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.⁴⁰

Section 604.02, subdivision 3, applies only to products liability cases:

Subd. 3. In the case of a claim arising from the manufacture, sale, use or consumption of a product, an amount uncollectible from any person in the chain of manufacture and distribution shall be reallocated among all other persons in the chain of manufacture and distribution but not among the claimant or others at fault who are not in the chain of manufacture or distribution of the product. Provided, however, that a person whose fault is less than that of a claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less.⁴¹

The loss reallocation rule adopted in subdivision 2 is a middle position between complete abolition of the rule of joint and several liability and full preservation of the rule. It requires the reallocation of an uncollectible share of a judgment among all the parties to the litigation, including the claimant. To illustrate the operation of the subdivision, assume that the plaintiff brings suit against two defendants, and that the jury apportions 10% of the fault to the Plaintiff, 10% to Defendant One, and 80% of the fault to Defendant Two, and that damages total \$10,000. Assume further that Defendant Two is insolvent and cannot pay his share of the judgment.

Under the unmodified rule of joint and several liability the plaintiff would be entitled to recover 90% of her damages from Defendant One. However, under the loss reallocation rule of section 604.02, subdivision 2, Defendant Two's uncollectible share of \$8,000 must be reallocated among the remain-

40. 1978 Minn. Laws, ch. 738, sec. 8.

41. MINN. STAT. § 604.02, subd. 3 (1988).

ing parties who are at fault, including Plaintiff, according to their respective percentages of fault. This means that because Plaintiff and Defendant One are equally at fault, each must bear one-half of the uncollectible \$8,000. Therefore, Defendant One is responsible for 10% of Plaintiff's damages, plus one-half of the uncollectible \$8,000, or \$4,000. Defendant One is therefore liable to Plaintiff for a total of \$5,000. Plaintiff is also responsible for one-half of the uncollectible \$8,000.

The loss reallocation rule in subdivision 2 has no application if the plaintiff is not at fault, however, or, if it does, it mandates the same result as the unmodified rule of joint and several liability. For example, in a case where the plaintiff is not at fault and two defendants are 2% and 98% at fault, the defendant who is 2% at fault is responsible for 100% of the plaintiff's damages in the event that defendant two cannot pay his fair share of the judgment. If the defendant who is 2% at fault pays the plaintiff 100% of the plaintiff's damages, that defendant will have a contribution claim against the defendant who was found 98% at fault, although the contribution claim may be worthless.

Subdivision 3 mandates a different result in some products liability cases. Where a defendant in the chain of manufacture and distribution is unable to pay its fair share of the judgment, that defendant's share is reallocated only to the remaining defendants in the chain, even where the plaintiff is at fault. To illustrate, assume the same facts as in the first hypothetical, except that Defendant One is a retailer and Defendant Two is an insolvent manufacturer. The uncollectible 80%, or \$8,000, is the sole responsibility of the remaining defendant in the chain of manufacture and distribution, Defendant One. Defendant One thus must pay Plaintiff 90% of Plaintiff's damages. In effect, the rule of joint and several liability is preserved as to defendants in the chain of distribution.

In 1986, the legislature again amended the statute to limit the liability of the state and its municipalities. The amendment added the following restriction to subdivision 1 of section 604.02: "If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for an amount no greater than twice the amount of fault."⁴²

42. MINN. STAT. § 604.02, subd. 1 (1988).

The legislature also amended the statute in 1988.⁴³ This time the amendments applied to tort claims in general, with the exception of certain environmental torts. With that amendment, subdivision 1 now reads as follows:

When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where liability arises under chapters 18B — pesticide control, 115 — water pollution control, 115A — waste management, 115B — environmental response and liability, 115C — leaking underground storage tanks, and 299E [*sic*] — pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01, a person whose fault is 15% or less is liable for a percentage of the whole award no greater than four times the percentage of fault, including any amount reallocated to that person under subdivision 2.

If the state or a municipality as defined in section 466.01 is jointly liable, and its fault is less than 35 percent, it is jointly and severally liable for a percentage of the whole award no greater than twice the amount of fault, including any amount reallocated to the state or municipality under subdivision 2.⁴⁴

The 1988 amendment limits the exposure of a defendant who is jointly and severally liable by holding any such defendant who is 15% or less at fault to no more than four times that defendant's percentage of fault; the limitation is inapplicable to cases involving environmental tort claims. The amendment also makes it clear that the limitation on liability, as well as the limitation on the liability of the state and its municipalities, applies to limit the loss reallocation provision in subdivision 2.

The effect of the amendments is to create varying rules concerning joint and several liability, depending on the type of case. There may be different rules for automobile accident cases, environmental torts cases, products liability cases, and cases involving the state or its municipalities. A series of hy-

43. 1988 Minn. Laws, ch. 503, sec. 3.

44. MINN. STAT. § 604.02, subd. 1 (1988) (statute erroneously refers to 299E, it should be 299F).

potheticals will illustrate the operation of the statute following the 1988 amendments. The hypotheticals involve varying assignments of fault in four situations: (1) an automobile accident case; (2) a case involving defendants who have committed environmental torts; (3) a case involving the State of Minnesota or one of its municipalities; and (4) a products liability case where the defendants are in the chain of manufacture and distribution.

Case #1

Assume that there are two defendants who are 5% and 95% at fault, and that Defendant One, who is 95% at fault, is insolvent. Also assume that Plaintiff's damages total \$10,000 and that the defendants are drivers of automobiles who negligently caused injury to Plaintiff.

Prior to the 1988 amendment Defendant Two, who is 5% at fault, would have been held liable for 100% of Plaintiff's damages, or \$10,000. After the amendment Defendant Two, who is 5% at fault, will be held liable for no more than 4 times its percentage of fault. The 5% defendant is thus liable for 20% of the plaintiff's damages, or \$2,000.

If the two defendants committed environmental torts, then Defendant Two would be held liable for 100% of the plaintiff's damages, because the limitation on joint and several liability is inapplicable to such actions.

If Defendant Two is the State or a municipality and another defendant, then the State or municipality would be liable for no more than twice the percentage of fault, or 10%.

If the case is a products liability case and both defendants are in the chain of manufacture and distribution, then Defendant Two should be responsible for 100% of the plaintiff's damages, unless the 1988 limitation is also intended to apply to products liability cases. However, the way the amendment is structured makes it appear that the limitation does not apply to products liability cases covered in section 604.02, subdivision 3.

The 1988 amendment to subdivision 1 of section 604.01 states that the rule of joint and several liability is subject to the 4 times the percent of fault limitation, with the exception of environmental torts, and that the limitation applies to reallocation under section 604.02, subdivision 2. The important quali-

fication is that it applies only to subdivision 2 reallocations. The amendment says nothing about reallocation under subdivision 3. Unless products liability cases are specifically construed to be exempted from the amendment, the result is that subdivision 1 will be construed to limit a products liability defendant's liability to no more than four times its percentage of fault, yet subdivision 3 will permit reallocation of an uncollectible share of a products liability defendant's share of the judgment to other products liability defendants in the chain.

There is no limitation on reallocation expressed in subdivision 3 and no limitation on reallocation expressed in subdivision 1. To give effect to both the 1988 limitation on joint and several liability and the previously enacted reallocation rule for products liability cases, it is arguably necessary to make the assumption that the legislature intended to leave products liability cases unaffected because of the special rule on reallocation in subdivision 3. In effect, the reallocation rule of subdivision 3 retains the rule of joint and several liability in products liability cases for defendants who are in the chain of manufacture and distribution.

Case #2

Assume that Defendant One is 16% at fault and Defendant Two is 84% at fault, and Defendant Two is unable to pay its fair share of the judgment. In this situation, Defendant One, who is 16% at fault, would be liable for 100% of the plaintiff's damages in the automobile accident case, the environmental tort case, and the products liability case. If Defendant One is the State or a municipality, then liability would be limited to twice the amount, or 32% of the plaintiff's damages.

Case #3

Now assume that Defendant One is 35% at fault and Defendant Two is 65% at fault and that Defendant Two is unable to pay its fair share of the judgment. In the automobile accident, environmental tort, and products liability cases the plaintiff will be entitled to collect 100% of his damages from the remaining solvent defendant. If Defendant One, who is 35% at fault is the State or a municipality, the limitation on joint and several liability is no longer applicable and the unrestricted rule of joint and several liability applies.

To illustrate the operation of the loss reallocation rule following the 1988 amendment, assume that the plaintiff is 5% at fault and that there are two defendants, Defendant One, who is 5% and Defendant Two, who is 95% at fault, and that Defendant Two is insolvent. In the automobile accident case the plaintiff and Defendant One, the remaining defendant, are equally at fault. Prior to the 1988 amendment they would, therefore, be equally responsible for the uncollectible 90% of the judgment. One-half of that uncollectible 90% would be assigned to Defendant One, who is 5% at fault and one-half to the plaintiff. Defendant One would thus be liable for its 5% plus 45% on the reallocation. Defendant One would thus have to pay the plaintiff \$5,000. After the 1988 amendments the liability of Defendant One would be limited to four times its percentage of fault, or 20% of the plaintiff's damages. The amendment ensures that the loss reallocation provision of subdivision 2 will not increase the liability of a defendant who is protected by the "15% x 4" rule.

IV. THE STATUTORY EXEMPTIONS

A. *The Exemptions*

The 1988 amendment exempts certain environmental actions from the limitations on the rule of joint and several liability. The limitations are inapplicable

in cases where liability arises under chapters 18 — pesticide control, 115 — water pollution control, 115A — waste management, 115B — environmental response and liability, 115C — leaking underground storage tanks, and 299E [*sic*] — pipeline safety, public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01. . . .

Chapter 18B covers pesticide control. It governs the use and storage of pesticides and establishes a scheme for administrative enforcement of the statute. Chapter 115 covers water pollution. Like chapter 18B, it also provides for the administrative enforcement of the Act. Chapter 115A covers waste management, including a provision covering financial responsibility of operators of hazardous waste stabilization and containment facilities established under the statute. Those chapters contain nothing that specifically covers joint and sev-

eral liability. Chapter 115B is the Minnesota Environmental Response and Liability Act. Unlike the other chapters, it contains specific provisions governing joint and several liability. Section 115B.04, subdivision 1 states that:

Except as otherwise provided in subdivisions 2 to 12, and notwithstanding any other provision or rule of law, any person who is responsible for a release or threatened release of a hazardous substance from a facility is strictly liable, jointly and severally, for the following response costs and damages which result from the release or threatened release or to which the release or threatened release significantly contributes:

- (a) All reasonable and necessary response costs incurred by the state, a political subdivision of the state or the United States;
- (b) All reasonable and necessary removal costs incurred by any person; and
- (c) All damages for any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss.⁴⁵

Section 115B.05 covers liability for other losses. Subdivision 1 reads as follows:

45. MINN. STAT. § 115B.04, subd. 1 (1988). Subdivision 4 provides that "[t]he liability of a political subdivision under this section is subject to the limits imposed under section 466.04, subdivision 1." *Id.* at subd. 4.

If joint and several liability applies, section 115B.08 provides guidelines for the apportionment of liability:

Subdivision 1. Right of apportionment; factors. Any person held jointly and severally liable under section 115B.04 has the right at trial to have the trier of fact apportion liability among the parties as provided in this section. The burden is on each defendant to show how that defendant's liability should be apportioned. The court shall reduce the amount of damages in proportion to any amount of liability apportioned to the party recovering.

In apportioning the liability of any party under this section, the trier of fact shall consider the following:

- (a) The extent to which that party's contribution to the release of a hazardous substance can be distinguished;
- (b) The amount of hazardous substance involved;
- (c) The degree of toxicity of the hazardous substance involved;
- (d) The degree of involvement of and care exercised by the party in manufacturing, treating, transporting, and disposing of the hazardous substance;
- (e) the degree of cooperation by the party with federal, state, or local officials to prevent any harm to the public health of the environment; and
- (f) Knowledge by the party of the hazardous nature of the substance.

MINN. STAT. § 115B.08, subd. 1 (1988).

Except as otherwise provided in subdivisions 2 to 10, and notwithstanding any other provision or rule of law, any person who is responsible for the release of a hazardous substance from a facility is strictly liable for the following damages which result from the release or to which the release significantly contributes:

(a) all damages for actual economic loss including:

(1) any injury to, destruction of, or loss of any real or personal property, including relocation costs;

(2) any loss of use of real or personal property;

(3) any loss of past or future or income or profits resulting from injury to, destruction of, or loss of real or personal property without regard to the ownership of the property; and

(b) all damages for death, personal injury, or disease including:

(1) any medical expenses, rehabilitation costs or burial expenses;

(2) any loss of past or future income or loss of earning capacity; and

(3) damages for pain and suffering, including physical impairment.⁴⁶

Section 115B.05, as enacted, provided that “any person who is responsible for the release of a hazardous substance from a facility is strictly liable *jointly and severally*” for the enumerated damages.⁴⁷ In 1985 the legislature amended section 115B.05 deleting the words “jointly and severally,” leaving that section in its present form.⁴⁸

Section 115B.055, subdivision 1 of the act, also adopted in 1985,⁴⁹ specifically covers joint and several liability:

The enactment of Laws 1983, chapter 121, section 5, relating to joint and several liability, and the subsequent amendment of section 115B.05 as provided in this act, shall not be construed in any way as a determination of legislative intent regarding the applicability of joint and several liability in any action brought under section 115B.05. The determination of whether joint and several liability applies in any action brought under section 115B.05 shall be based solely

46. MINN. STAT. § 115B.05, subd. 1 (1988).

47. 1983 Minn. Laws, ch. 12, sec. 5.

48. 1985 Minn. Laws, First Spec. Sess., ch 8, sec. 1.

49. 1985 Minn. Laws, First Spec. Sess., ch. 8, sec. 17.

on applicable statutory and common law.⁵⁰

Therefore, in cases covered by section 115B.05, where there are joint, concurrent, or successive actions by two or more defendants that result in a single, indivisible injury to the plaintiff, principles of joint and several liability should be applicable.⁵¹ The exception for environmental torts in the 1988 amendment of section 604.02 reinforces that conclusion.

Section 115B.09 of the act states that "[t]he provisions of section 604.01 and 604.02, subdivisions 1 and 2, apply to any action for damages under section 115B.05."⁵² However, the statutory exception for environmental tort actions in the 1988 amendment of the Comparative Fault Act means that section 604.02, subdivision 1, limiting the application of joint and several liability, does not apply.

Chapter 115C, the petroleum tank release cleanup act,⁵³ covers cases where there is a discharge of petroleum, including gas, fuel, and crude oil. It provides the administrative enforcement of its provisions and civil penalties for its violations.

Chapter 299F in part covers pipeline safety. It also provides for the administrative enforcement of the act and for civil penalties for its violation.⁵⁴

Aside from section 115B, the other chapters mentioned in the 1988 amendment do not specifically mention the rule of joint and several liability. In cases where civil penalties are imposed it may be that the rule of joint and several liability is inapplicable. However, if private causes of action are implied for violation of those statutes the rule of joint and several liability would be critical in actions for personal injury or property damage caused by those statutory violations.

In addition to the statutes noted in the amendment, there are other claims that are exempted. They include "public nuisance law for damage to the environment or the public health, any other environmental or public health law, or any environmental or public health ordinance or program of a municipality as defined in section 466.01."

50. MINN. STAT. § 115B.055 (1988).

51. Section 115B.08, covering apportionment of liability in cases involving section 115B.04, is inapplicable to claims brought under section 115B.05.

52. MINN. STAT. § 115B.09 (1988).

53. MINN. STAT. § 115C.01-.10 (1988).

54. See MINN. STAT. § 299F.56-.641 (1988).

This catchall language could include a variety of environmental tort claims, as a quick reference to the index of the Minnesota Statutes will establish. It makes clear that the primary intent of the legislature is to exempt from the limitations on joint and several liability any claim that might be loosely characterized as an environmental tort claim.

B. The Legislative History

The reasons for the 1988 amendments of the rule of joint and several liability may not be readily apparent, particularly given the seemingly arbitrary set of rules that is the result of the legislative alterations of the rule of joint and several liability. The 1987 hearings before the Civil Law Subcommittee of the House Judiciary Committee⁵⁵ and the House floor debates on House File 1493, the joint and several liability bill that encompassed the changes made in 1988 by the legislature,⁵⁶ illuminated the legislative concerns over the rule of joint and several liability.

First, while concern had previously been expressed over the rule, consideration of the rule in 1988 was the direct product of a compromise necessitated because of the repeal of the discount statute.

Second, the position taken on the rule of joint and several liability, limiting the liability of a defendant found to be 15% or less at fault to four times the defendant's percentage of fault, was itself the result of compromise. House File 1493 initially limited joint and several liability by limiting the liability of a defendant less than 10% at fault to ten times that defendant's liability. It was intended to rectify the worst case, the situation where a defendant one percent at fault would be liable for 100% of the plaintiff's damages. An attempt to amend that limitation to make the limitation adopted in 1986 for the State and its municipalities uniform in all joint and several liability cases failed. The final limitation, the "15% x 4" rule, was then adopted as a compromise.

Third, the motivation for the limitation on joint and several liability was not any perceived crisis in liability insurance. The rationale for the proposed limitations on the rule of joint and

55. Hearings on H.F. 707 before the Civil Law Subcommittee of the House Judiciary Committee, Dec. 8, 1987.

56. House Floor Debates on H.F. 1493, March 28, 1988.

several liability instead was the perceived unfairness of the rule. The primary point that supporters of the limitation made was that the rule of joint and several liability created a new class of victims—the persons who are required to pay a disproportionate share of a judgment. There was an acknowledgment that limitation of the rule of joint and several liability would work to the disadvantage of personal injury plaintiffs, but supporters of the limitation steadfastly maintained that this disadvantage did not justify the adverse impact of the rule on persons with minimal fault.

Retention of the rule as it previously existed for environmental torts appears to be a reflection of nothing other than the fact that the legislature had already taken a position on joint and several liability in an earlier session and that it would unnecessarily confuse the joint and several liability issue to raise that question again.⁵⁷

V. OTHER EXCEPTIONS

The rule of joint and several liability should also continue to apply to products liability cases where the defendants are in the chain of manufacture and distribution, as previously indicated. Beyond the environmental tort and products liability cases, there is no statutory guidance for determining whether joint and several liability should be preserved in other situations.

However, there are other situations in which a good argument can be made that the rule of joint and several liability should be retained, notwithstanding the lack of a specific legislative incorporation of those exceptions.

One of those situations was raised in the House floor debates on House File 1493. Representative Voss moved an amendment to the bill that would have preserved joint and several liability in cases involving concerted action. That amendment was an amendment to an amendment that ultimately was rejected, so the change was not specifically incorporated. It was not raised again during the floor debates, although one of the representatives asked whether any amendment was necessary, given the fact that joint and several liability had existed by

57. Hearings on H.F. 707 before the Civil Law Subcommittee of the House Judiciary Committee, Dec. 8, 1987.

way of common law rule for defendants engaging in concerted action. Representative Voss suggested that the common law rule should be codified to avoid any problems.⁵⁸

The discussion concerning the concerted action exception indicates legislative recognition that there may be other, judicially created exceptions to any limitations on the rule of joint and several liability. It is an open question as to how cases should be resolved when it seems equitable to treat two or more parties as a unit for purposes of joint and several liability.

South Dakota's statute provides that a trier of fact may determine that "two or more persons are to be treated as a single party if their . . . acts or omissions . . . are so interrelated that it would be inequitable to distinguish between them."⁵⁹ This approach is more general than that taken in other jurisdictions, where the rule of joint and several liability has been preserved in specified cases,⁶⁰ but it provides a general guideline as to when the rule should be retained to defeat the "15% x 4" limitation in the 1988 amendment.

The issue as to when joint and several liability should be retained is similar to the problems that arise in determining how fault should be apportioned in multi-party litigation.⁶¹ Although the Minnesota Comparative Fault Act requires individual comparisons of fault,⁶² the supreme court has recognized that there are situations where two or more defendants are to be treated as a unit for purposes of the fault comparison.⁶³ While the unit rule has been applied where there is a joint venture, and the supreme court has indicated that the unit rule would apply in joint duty cases, the court has not foreclosed the potential application of the unit rule in other cases. The court has also applied the unit rule in *Larsen v. Minneapolis Gas Co.*,⁶⁴ in the context of a contribution claim:

58. *Id.*

59. S.D. CODIFIED LAWS ANN. § 15-8-15.2 (1988).

60. See Steenson, *supra* note 5, at 489-90.

61. For a discussion of the issue see Steenson, *The Fault with Comparative Fault: The Problem of Individual Comparisons in a Modified Comparative Fault Jurisdiction*, 12 WM. MITCHELL L. REV. 1 (1986).

62. See *Marier v. Memorial Rescue Serv., Inc.*, 296 Minn. 242, 246, 207 N.W.2d 706, 709 (1973).

63. See *Cambern v. Sioux Tools, Inc.*, 323 N.W.2d 795 (Minn. 1982) (indicating that the unit rule will apply in joint duty cases); *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841 (1973) (applying unit rule to joint ventures).

64. 282 Minn. 135, 163 N.W.2d 755 (1968).

Where there are multiple defendants and one or more of them is liable to the plaintiff solely on the basis of its relationship with one of the other defendants, the one guilty of the negligent conduct and the one to whom the negligence is imputed are to be treated as one party for purposes of determining the fair share of the verdict each defendant must pay.⁶⁵

Where two or more parties are treated as one party for purposes of determining the fair shares of a judgment, that application of the unit rule or concept should apply for purposes of comparisons of fault, contribution, and the rule of joint and several liability.

Viewed against this background, the unit rule may apply in various cases, with the result that the limitations on the rule of joint and several liability will be inapplicable. The unit rule should apply in cases involving joint ventures and joint duties. Those exceptions have in effect already been established by the supreme court in comparison cases. The rule should also be applied in cases involving concerted action. That exception was recognized by the legislature during the floor debates on House File 1493.⁶⁶ The application of the unit rule in vicarious liability and imputed fault cases is covered by the *Larsen* case.⁶⁷

Beyond these cases there are other situations where the rule could potentially apply, including cases where two or more defendants owe a common duty to the plaintiff, not only in products liability cases involving defendants in the chain of manufacture and distribution, but in any case where two or more defendants create an indivisible hazard which results in injury to the plaintiff. That concept justifies the statutory exception for environmental torts. It justifies the products liability exception. And it could be used to justify the application of the unit rule in cases such as asbestos cases.⁶⁸

The goal is to obtain a reasoned application of the rule of joint and several liability. Application of the rule of joint and

65. *Id.* at 150, 163 N.W.2d at 765.

66. The supreme court created the exception some time ago. See *supra* notes 7-8 and accompanying text.

67. The vicarious liability exception could be extended to any case involving derivative or imputed liability, or any case where the common law rules of indemnity apply. See Steenson, *supra* note 5, at 36 n.158.

68. See *id.* at 37-42.

several liability in the above cases will mean that the 1988 limitations on joint and several liability are inapplicable not only where there are statutory exceptions to the rule but also where it is equitable to treat two or more parties as a unit for purposes of determining their fair share of a judgment. If one party in the unit is unable to pay, that party's fair share of the judgment becomes the responsibility of the remaining parties in the unit, even if the fault of the remaining party or parties is 15% or less.

CONCLUSION

The rule of joint and several liability has undergone significant changes in Minnesota, particularly in 1986 and 1988. The result of the amendments is a list of rules that limits joint and several liability according to the type of claim and according to the percentage of fault assigned to the defendant or defendants. The rules are the clear result of political compromise.

The only statutory exceptions to the limitations on the rule of joint and several liability are cases involving environmental torts and cases involving products liability claims against defendants in the chain of manufacture and distribution. However, in addition to those exceptions courts should have the latitude to formulate additional exceptions in situations where a unit rule is justified. Those situations may range from cases where the defendants have engaged in concerted action to cases where the defendants have created an indivisible hazard that is the cause of injury to the plaintiff. The use of the unit rule tempers the statutory limitations on the rule of joint and several liability and gives the courts a means of arriving at equitable resolutions of joint and several liability issues.

